(2)

No. 91-800

In The

Supreme Court of the United States

October Term, 1991

CUMBERLAND & OHIO CO. OF TEXAS, INC.,

Petitioner,

v.

FIRST AMERICAN NATIONAL BANK,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Should this Court limit the discretion of the federal courts of appeals in deciding when to certify questions of state law to state supreme courts, either by mandating circumstances under which those courts must seek certification or by mandating factors those courts must consider each time a party requests certification?

Does a federal court of appeals have the discretion to decline to certify questions of law to a state supreme court when the party requesting certification delayed its request for certification until after the court of appeals, in a unanimous opinion, had rendered a decision against the party on the merits of the questions, when ample precedent from the supreme court of the state at issue supported the decision, and when one of the issues requested to be certified was a federal, rather than state, procedural question?

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STATEMENT OF THE CASE

On August 17, 1988, Petitioner Cumberland & Ohio Company of Texas, Inc. ("Petitioner"), the successor corporation of Herbert Materials Incorporated, filed suit in the Chancery Court of the State of Tennessee, Twentieth Judicial District, Davidson County. The complaint charged Respondent First American National Bank[1] ("First American" or "the bank") with, among other things, fraudulent and/or negligent misrepresentation, breach of fiduciary duty, violation of the federal bank tying act (12 U.S.C. §§ 1971 *et seq.*), and violation of the contractual duty of good faith and fair dealing. The allegations arose out of a lending relationship that existed between the parties from mid-1981 to mid-1983, five to seven years prior to the filing of Petitioner's complaint. First American removed the case to the United States District Court for the Middle District of Tennessee on September 15, 1988. Contrary to the assertion in the Petition for Writ of Certiorari ("Petition"), First American did not remove the case on the ground of diversity of jurisdiction. (Petition at 3, 7). Rather, although diversity existed, First American removed the case pursuant to 28 U.S.C. § 1331 (federal question) on the ground that the district court had subject matter jurisdiction because of the bank tying act claim. *See* Petition for Removal (Respondent's Appendix 1-2).

The case was tried before a jury beginning on September 5, 1989. The only claims submitted to the jury

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[1] First American National Bank's parent company is First American Corporation. Sup. Ct. R. 29.1.

were Petitioner's theories of breach of the loan agreements and breach of the contractual duty of good faith and fair dealing in the enforcement and performance of the loan agreements. All other claims were dismissed as untimely either by the district court under Tennessee's three-year statute of limitations (Tenn. Code Ann. § 28-3-105 (Petition at 2)) in response to the bank's motion *in limine*, or by the Petitioner at its own instance. (*See, e.g.*, Petition at 14a-15a).

On September 26, 1989, at the close of all the proof, First American moved for a directed verdict. The bank asserted, among other things, that Petitioner's claims had been extinguished in July 1983 when Petitioner, with the advice and assistance of counsel, executed and exchanged mutual waivers and releases of liability with First American. First American also reasserted that Petitioner's claims were barred by the three-year statute of limitations. The district court denied the directed verdict motion insofar as it was based on the statute of limitations and reserved decision on the remaining grounds. On September 28, 1989, the jury returned a general verdict against First American in the amount of six million dollars.

On October 11, 1989, First American timely filed a motion for judgment notwithstanding the verdict, for new trial or for remittitur, based on, among other grounds, the defenses of the three-year statute of limitations and the execution of the mutual waivers and releases. Contrary to the statements in the Petition, the bank had asserted the waiver and release as a defense throughout the litigation. Thus, the release issue was timely raised in this motion. On January 17, 1990, without

stating any grounds for its decision, the trial court entered a one sentence order denying the bank's motion.

First American timely appealed to the United States Court of Appeals for the Sixth Circuit. The bank urged the court to reverse the district court, based on, among other grounds, the defenses of the expiration of the statute of limitations and the execution of a waiver and release.

On June 12, 1991, in a unanimous opinion the Sixth Circuit reversed the district court, agreeing that the applicable statute of limitations barred Petitioner's claims and that Petitioner's execution of a waiver and release in 1983 precluded it from seeking damages from First American in its 1988 suit.

The Sixth Circuit based its statute of limitations holding on consideration of two statutes (Tenn. Code Ann. §§ 28-3-105 and 28-3-109), the Tennessee Supreme Court's opinions in *Vance v. Schulder*, 547 S.W.2d 947 (Tenn. 1977), and *Pera v. Kroger Co.*, 674 S.W.2d 715 (Tenn. 1984), and the Seventh Circuit's analysis in *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261 (7th Cir. 1990). Relying primarily on the Tennessee Supreme Court's opinion in *Vance v. Schulder*, the Sixth Circuit held that Tennessee's "three-year limitations period [Tenn. Code Ann. § 28-3-105] applies when a defendant has allegedly breached his contract, causing injury to the personal or real property of the plaintiff." Opinion of the Sixth Circuit at 5 (Petition at 5a). Because the court of appeals found that Petitioner's claim for breach of contract involved injury to personal or real property, it concluded

that the claim was barred by the three-year statute. Opinion of the Sixth Circuit at 6-7 (Petition at 6a-7a).

The court of appeals declared that the six-year statute of limitation (Tenn. Code Ann. § 28-3-109) urged by Petitioner did not apply because that statute applies only to "actions on contracts not otherwise expressly provided for" in the Tennessee code. The Sixth Circuit found no conflict between its analysis and the decision upon which Petitioner based its argument, *Harvest Corp. v. Ernst & Whinney*, 610 S.W.2d 747 (Tenn. Ct. App. 1980). However, the court noted that even if the Tennessee Court of Appeals' holding in *Harvest Corp.* had conflicted with the two Tennessee Supreme Court opinions, the latter opinions would control. Opinion of the Sixth Circuit at 5 (Petition at 5a).

As an independent, alternative basis for its ruling, the Sixth Circuit declared that Petitioner's execution of a waiver and release in 1983 barred it from asserting claims against First American in 1988. Opinion of the Sixth Circuit at 7-9 (Petition at 7a-9a). In so holding, the court rejected Petitioner's contention that it should be excused from enforcement of the waiver and release on the ground of economic duress. The court ruled that Petitioner was precluded from avoiding the release because it failed to repudiate the waiver and release for more than five years after the document was signed and because it retained the many benefits of the settlement.

Only after the Sixth Circuit issued this adverse opinion did Petitioner move the court of appeals to certify to the Tennessee Supreme Court the questions of which statute of limitations applied and whether First American

had not properly pled Petitioner's failure to repudiate the waiver and release. At that time Petitioner also petitioned for a rehearing and suggested a rehearing en banc. On July 23, 1991, the Sixth Circuit denied the Motion to Certify. On August 14, 1991, the Sixth Circuit denied the Petition for Rehearing as well.

REASONS FOR DENYING WRIT

Summary of Argument

The sole basis upon which Petitioner seeks review by this Court is the failure of the Sixth Circuit to certify the statute of limitations and procedural pleading issues to the Tennessee Supreme Court. There is no justification or need for this Court to impose upon the federal courts of appeal the inflexible standards for certification that Petitioner urges. Petitioner's proposals would prove unduly restrictive, unworkable and burdensome upon the federal courts of appeals and state supreme courts.

Furthermore, the Sixth Circuit acted correctly in denying the certification request in this case because the issues for which Petitioner sought certification were not state law claims for which there was no controlling precedent, as required under the Tennessee Supreme Court certification rule. *See* Tenn. Sup. Ct. R. 23.

Finally, denial of the Petition is particularly appropriate in this case because Petitioner is seeking to obtain certification of issues that it had not contended were uncertain, requiring state court assistance, until after it had received an adverse decision by the court of appeals.

Argument

1. This Court Should Deny the Petition Because the Procedure and Standards for Certification that Petitioner Urges this Court to Adopt Would Unduly and Unnecessarily Restrict the Discretion of the Courts of Appeal, and Would Be Burdensome on Both Federal and State Courts.

This Court should not grant a writ of certiorari to consider issuing guidelines for certification as Petitioner urges because there is no conflict among federal circuits as to criteria for certification, no need for guidance by this Court and no other condition that meets the standards for granting review pursuant to Sup. Ct. R. 10. This Court fully and completely addressed the issue of certification in *Lehman Brothers v. Schein*, 416 U.S. 386 (1974).

In *Lehman Brothers*, the Court declined to do what Petitioner now requests, that is, to adopt inflexible requirements or standards as to when a federal court of appeals must or should certify a question. Rather, it left these decisions to the sound discretion of the courts of appeals:

> [T]he mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit. We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.

416 U.S. at 390-91. In fact, the concurring opinion in *Lehman Brothers* stressed the problems that would result were this Court to adopt, as suggested by Petitioner, stringent standards as to certification:

> But a sensible respect for the experience and competence of the various integral parts of the federal judicial system suggests that we go slowly in telling the courts of appeals or the district courts how to go about deciding cases where federal jurisdiction is based on diversity of citizenship, cases which they see and decide far more often than we do.
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> * * *
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> While certification may engender less delay and create fewer additional expenses for litigants than would abstention, it entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court.

416 U.S. 393, 394.

The mistrust that Petitioner apparently holds for federal courts of appeals and their competence is unfounded and stands in opposition to the vote of confidence this Court provided to those judges in *Lehman Brothers*, and more recently in *Salve Regina College v. Russell*, 113 L. Ed. 2d 190 (1991). In *Salve Regina College*, this Court expressly held that federal courts of appeals are in a better position than district courts to decide issues of law, including issues of state law:

> District judges preside alone over fast-paced trials: of necessity they devote much of their energy and resources to hearing witnesses and

> reviewing evidence. Similarly, the logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and brief. Thus, trial judges often must resolve complicated legal questions without benefit of "extended reflection [or] extensive information."
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> Courts of appeals, on the other hand, are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues.

113 L. Ed. 2d at 198 (citations omitted).

Petitioner advances two reasons why this Court should abandon the views it expressed in *Lehman Brothers* and *Salve Regina College* and consider Petitioner's proposed certification standards. First, Petitioner argues that the Sixth Circuit erroneously decided the merits of the two issues for which Petitioner sought certification. (Petition at 7). Petitioner's belief that the Sixth Circuit erred does not justify completely removing, or even limiting, the discretion of all federal courts of appeals as to when or whether to grant certification.

Second, Petitioner argues that the standards it proposes are necessary to effectuate the policies of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). However, the Sixth Circuit in this case has in no sense encouraged forum-shopping in diversity cases in violation of *Erie*. First

American did not remove the case on the basis of diversity, but on the existence of a federal question. Moreover, the Sixth Circuit's opinion does not conflict with any opinion of the Tennessee Supreme Court and accordingly will not promote forum-shopping.

The standards that Petitioner urges this Court to adopt for certification would be unworkable, would result in even further delays for litigants making their way through the federal courts and would burden both the federal and state court systems. Petitioner first proposes that this Court *require* all federal courts of appeals to certify every state law issue presented to them if the state law on the issue is "uncertain" and there is a disagreement among the members of the court of appeals panel or, as in this case, between the district court and the court of appeals. In other words, a court of appeals could never reverse a district court on any issue of state law that qualifies as "uncertain" without first seeking certification from the state supreme court. This standard would burden both federal and state courts without serving any legitimate interests. As this Court recognized in both *Lehman Brothers* and *Salve Regina College*, the judges on the federal courts of appeals are more qualified and competent to decide issues of state law, even if, in doing so, they reach a different conclusion than the district court.

Alternatively, Petitioner requests that this Court require federal courts of appeals to apply certain enumerated factors whenever a party seeks certification. The assumption underlying this request – that the federal courts of appeals, and the Sixth Circuit in particular, do not currently consider all issues presented to them fully

and competently, including requests for certification – is not only unwarranted but is contrary to the views that this Court expressed in *Lehman Brothers* and *Salve Regina College*.

Petitioner presents absolutely no support, legal, logical, or practical, for the factors that it suggests a federal court of appeals should be required to consider. These factors are:

> Whether state law is so uncertain as to require a prediction as to what the state court of last resort would rule under the circumstances; whether there is disagreement as to the applicable state law either within the appellate panel or between the appellate judges and the district court judge; the relative experience of the appellate and district court judges in resolving issues under the applicable state law; and the significance of the additional cost involved in certifying the question, considering the monetary amount of the judgment being reviewed and other relevant factors.

Petition at 6. Not only does Petitioner provide no support or reason for any of these factors, but many of them are clearly inappropriate, inapplicable or both. For example, there is no indication in this case that there was a disagreement within the appellate panel to deny the Motion to Certify. Similarly, deference by the courts of appeal to district court decisions on legal issues was rejected by this Court in *Salve Regina College*. Contemplation of the monetary amount of the judgment awarded would subordinate rules of law and constitutional principles to questions of wealth.

This Court should reject the Petition because there is no reason justifying adoption of any new standard for certification. *Lehman Brothers* provided federal courts with adequate guidance as to certification in the federal system, and Petitioner has not cited any evidence that those courts are unable to follow, or are not following, the dictates of *Lehman Brothers*.

2. This Court Should Deny the Petition Because the Issues on Which Certification Was Sought Did Not Satisfy Federal or Tennessee Standards for Certification.

Certification was not appropriate in this case either under current federal standards or under the Rules of the Tennessee Supreme Court. First, the issues for which Petitioner sought certification were not uncertain issues under Tennessee law, and thus were not of the type that federal courts do or should certify. Courts have consistently held that certification is not "to be routinely invoked whenever a federal court is presented with an unsettled question of state law." *Armijo v. ExCam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988); *see also Tidler v. Eli Lilly and Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988) ("Where the applicable state law is clear, certification is inappropriate; it is not a procedure by which federal courts may abdicate their responsibility to decide a legal issue when the relevant sources of state law available to it provide a discernible path for the court to follow."); *Perkins v. Clark Equipment Co.*, 823 F.2d 207, 209 (8th Cir. 1987) (citations omitted) ("Absent a 'close' question and lack of state sources, enabling a nonconjectural determination, a federal court should not avoid its responsibility to determine

all issues before it.' "); 17A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4248, at 173 (1988) ("Questions ought not to be certified if the answer is reasonably clear."). This Court has stressed that "[t]he mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit." *Lehman Brothers*, 416 U.S. at 390. Certification should be granted only in exceptional circumstances when a federal court foresees difficulty in resolving an issue of state law. The instant suit is not such a case.

Second, certification would not have been appropriate under the Tennessee Supreme Court Rule governing certification. That rule expressly requires that an issue be one for which there is no controlling precedent:

> The Supreme Court may, at its discretion, answer questions of law certified to it by the Supreme Court of the United States or a Court of Appeals of the United States. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and *as to which it appears to the certifying court that there is no controlling precedent in the decisions of the Supreme Court of Tennessee.*

Tenn. Sup. Ct. R. 23 (emphasis added). As the Sixth Circuit recognized in this case, the Tennessee Supreme Court had addressed the issue of which statute of limitations applies to a claim alleging a plaintiff has incurred damage to its property on at least two prior occasions. *See* Opinion of the Sixth Circuit at 5-7 (Petition at 5a-7a); *Pera v. Kroger Co.*, 674 S.W.2d 715, 719-20 (Tenn. 1984); *Vance v.*

Schulder, 547 S.W.2d 927 (Tenn. 1977). In addition, as the Sixth Circuit noted, the Seventh Circuit had interpreted the Tennessee statutes of limitations in a similar manner. *See United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1272 (7th Cir. 1990). Accordingly, the statute of limitations issue did not present a unprecedented question of law that would have justified the certification of that issue to the Tennessee Supreme Court.

The issue of the alleged failure to plead an affirmative defense likewise is not without precedent. *See, e.g., Hixson v. Stickley*, 493 S.W.2d 471, 473 (Tenn. 1973); *Ottenheimer Publishers, Inc. v. Regal Publishers, Inc.*, 626 S.W.2d 277, 279 (Tenn. Ct. App.), *perm. app. denied* (Tenn. 1981). In fact, Petitioner does not claim this issue is uncertain requiring state court guidance. Instead, Petitioner merely contends that the Sixth Circuit erroneously applied existing Tennessee law. *See* Petition at 7 (*citing Exum v Washington Fire & Marine Insurance Co.*, 41 Tenn. App. 610, 197 S.W.2d 805 (1955)). Certification is not designed or intended to provide litigants an automatic second chance at appellate review of state law issues in the federal system.

In any event, the Sixth Circuit was correct in ignoring Petitioner's repudiation argument based on Tennessee law. The issue of which affirmative defenses must be pled and what constitutes an affirmative defense are procedural issues to be determined under federal, not state law. *See, e.g., Sayre v. Musicland Group, Inc.*, 850 F.2d 350, 352-54 (8th Cir. 1988). Further, the execution of the waiver and release, not the subissue of repudiation of the waiver and release, was the affirmative defense that was required to be, and was, pled. *See* Fed. R. Civ. P. 8(c); *see*

also Tenn. R. Civ. P. 8.03; *Ottenheimer Publishers*, 626 S.W.2d at 279.

In any event, First American more than adequately provided Petitioner with notice of its failure to repudiate. The bank's Answer asserted the waiver and release as a defense to all of Petitioner's claims. The issue of repudiation was then specifically raised in First American's trial brief, at the directed verdict stage, in proposed jury instructions, and in its post-trial motion and memorandum. Thus, the Sixth Circuit was well within its discretion in deciding not to certify to the Tennessee Supreme Court the procedural question of whether it had correctly interpreted the pleadings in the record on appeal.

Finally, Tenn. Sup. Ct. R. 23 confers absolute discretion upon the Tennessee Supreme Court to accept or reject a request for certification. Had Petitioner's two issues come within the Rule's requirements, and had the court of appeals certified both issues, the Tennessee Supreme Court would have had no obligation to accept review.[2] Particularly in light of the lack of merit in Petitioner's request, the Sixth Circuit acted correctly in rejecting the request because certification would merely

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[2] Because the expiration of the statute of limitations and the execution of the waiver and release were alternative grounds for reversal of the lower court's ruling, the Tennessee Supreme Court would have had to accept certification of *both* issues in order to affect the court of appeals' holding. Further, the court of appeals noted that it did not consider additional grounds for reversal due to its ruling on the statute of limitations and waiver and release issues. Opinion of the Sixth Circuit at 9 (Petition at 9a).

have delayed the finality, but not changed the outcome, of this litigation.

3. This Court Should Deny the Petition Because Petitioner Requested Certification Too Late in the Appellate Process.

This particular Petition should be denied because Petitioner belatedly sought certification only after receiving an adverse determination on the merits of the issues from the Sixth Circuit. Federal courts properly have been unwilling to exercise their discretion to certify state law questions when a litigant is using the certification procedure as a method of gaining a second chance to prevail on an issue that has already been resolved against it. *See, e.g., Fischer v. Bar Harbor Banking and Trust Co.*, 857 F.2d 4, 7 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989) ("Though the failure to raise the issue would not necessarily prevent our certifying at this late stage, it considerably weakens plaintiff's insistence on his right to certification."); *Tidler v. Eli Lilly and Co.*, 851 F.2d at 426 (denying request for certification in part because plaintiff did not request certification until after adverse decision had been entered); *Armijo v. ExCam, Inc.*, 843 F.2d at 407 (denying request for certification in part because court noted that "plaintiff did not request certification until after the district court made a decision unfavorable to her."); *Perkins v. Clark Equipment Co.*, 823 F.2d at 210 ("The practice of requesting certification after an adverse judgment has been entered should be discouraged."). In fact, in *Lehman Brothers*, then Justice Rehnquist, concurring, specifically criticized tactics like Petitioner's:

> Thus petitioners seek to upset the result of more than two years of trial and appellate litigation on the basis of a point which they first presented to the Court of Appeals upon petition for hearing.
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> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used.

416 U.S. at 393, 395.

In the present suit, had Petitioner believed that the issues it now seeks to certify – which statute of limitations applied to its claims and whether First American failed to plead correctly the issue of repudiation of the release – actually merited consideration by the Tennessee Supreme Court, Petitioner could and should have requested certification at the beginning of the appellate process.[3] Instead, it waited until the Sixth Circuit resolved these issues against its position to claim that the issues are unsettled and deserving of certification. This Court should not encourage such use of the appellate and certification processes.

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[3] Tenn. Sup. Ct. R. 23 does not provide for certification from a federal district court. Petitioner accordingly could not have sought certification at the district court level.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CUMBERLAND & OHIO CO. OF TEXAS, the successor corporation of HERBERT MATERIALS INCORPORATED, Plaintiff,	)	CIVIL ACTION NO. 3 88 0784
v.	)	
FIRST AMERICAN BANK OF NASHVILLE, Defendant.	)	

PETITION FOR REMOVAL

(Filed Sept. 15, 1988)

TO: The Judges of the United States District Court for the Middle District of Tennessee

Defendant, First American National Bank, (inaccurately designated as "First American Bank of Nashville"), respectfully shows to the Court as follows:

1. On the 18th day of August, 1988, the defendant was served with a copy of a Summons and Complaint filed in the Chancery Court for Davidson County, Tennessee, styled *Cumberland & Ohio Co. of Texas v. First American Bank of Nashville*, being Docket No. 88-2226-I. The Complaint was filed on August 17, 1988. A copy of the Summons and Complaint is attached hereto as Exhibit A. No other proceedings have been had therein.

2. The above-described action is one of which this Court has original jurisdiction under the provisions of 28 U.S.C. § 1331 in that it is a civil action arising under the Constitution, laws, or treaties of the United States, and specifically under 12 U.S.C. § 1971 *et seq.* (*See* ¶ 2.18 of Plaintiff's Complaint). Accordingly, this case can be removed under 28 U.S.C. § 1441(b) and/or (c).

3. The defendant has filed herewith a bond with good and sufficient surety conditioned as provided by 28 U.S.C. § 1446(d) that they will pay all costs and disbursements incurred by reason of this Petition for Removal should it be determined that this case was not removable or was improperly removed.

WHEREFORE, defendant prays that the above action now pending against it in the Chancery Court for Davidson County, Tennessee, be removed to this Court.

/s/ Robert J. Walker
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Anthony J. McFarland
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ATTORNEYS FOR
DEFENDANT

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Robert J. Walker, being first duly sworn, deposes and says that he is a member of the law firm of Bass, Berry & Sims, attorneys for the defendant, that he is duly authorized in the premises; that all of the allegations in the foregoing Petition for Removal are true to the best of his knowledge and belief.

/s/ Robert J. Walker
Robert J. Walker

Sworn to and subscribed before me this 15th day of September, 1988.

/s/ Janis M. Watts
Notary Public

My Commission Expires:

5/13/89

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Removal has been served upon Nader Baydoun and John I. Harris III, Suite 600, 49 Music Square West, Nashville, Tennessee 37203, by United States Mail, postage prepaid, this the 15th day of September, 1988.

/s/ Robert J. Walker